

Building evidence for use in criminal cases – standard practice and methodologies – A case study in Australia

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Abstract

In criminal and civil investigations relating to art fraud, the question of how evidence is gathered is as relevant as the question of what is gathered. The sensitive nature of the evidence also means that often the sharing of information between professionals, such as curators, gallerists and art historians is minimal and restricted. Sometimes art historical accounts provided as evidence can be difficult to verify against properly referenced data, while the materials analysis data can be open to various interpretations. In addition, assertions of art fraud have been met with action for libel. As a result, the lack of an integrated analytical and investigative methodology can hamper investigation, making conviction difficult. As an interdisciplinary study conservation is seen to provide 'objective' scientific data that can explicate and verify propositions about the source or history of an artwork. Drawing on work undertaken at the University of Melbourne's Centre for Cultural Materials Conservation (CCMC) this paper discusses the development of standards, methodologies and guidelines for data collection to strengthen prosecution procedures and meet the evidentiary requirements of the courts, and explains why conservation provides the critical and objective procedures useful in bringing forward a successful prosecution for art fraud.

Introduction

If statistics are to be believed, the Australian art market has very little to fear from fakes, forgeries and fraud. Between 1999 and 2013 there were two successful prosecutions for art fraud (R v John Douglas O' Loughlin [2002]; R v Ivan Liberto and Pamela Yvonne Liberto [2008]) and two civil cases; one that was successful based on the argument that the fraudulent works damaged the artists' reputation and therefore impacted on the value of their oeuvre (Blackman and Ors v Gant and Anor [2010]), and the other that contested the advice given in regard to the sale of a fraudulent work (McBride v Christie's Australia Pty Limited [2014]). From the beginning of the twentieth century there appear to have been less than a handful of successful prosecutions for art fraud in Australia. On the basis of these figures, and in a market with an income of some \$1bn (IBIS 2014), art fraud appears to be an issue of underwhelming proportions. There are, however, critical reasons why this is not the case, and why art fraud does in fact present a significant problem in the Australian art market.

One reason for the apparent low incidence of fraudulent activity is that art fraud is a particularly difficult crime to prosecute and the Australian art market, like art markets the world over, is unregulated, preferring to self regulate rather than draw attention to issues that may impact on its reputation. A survey of material in the Australian press provides a more realistic story, particularly from 1974 when the Sydney Morning Herald (SMH) commented on suspect works that included attributions to Gauguin, Titian, Cezanne, Whistler and Turner (Staff reporters *SMH*1974:7). From that time the Australian press

began to regularly identify art fraud as an issue, with claims that forgery has been rife in Australia since the early to mid 1970s (Robert Bleakley, then Director of Sotheby's, in McDonald 1987:8). These article often identified locations and sources of fraudulent work with the journalists' informants clearly being individuals who were active agents in the art market. The claims were broad and consistent, and centred on the proposition that there had been organised production of fraudulent works in Melbourne, Sydney, Brisbane and Adelaide, and that these works had penetrated the market (see for example: Sydney Morning Herald 1974:7 and 10; MacDonald 1987:8; Maslen and Hawley 1987:1; Stretton 1988:1; Bagwell 1992:14; Daly 1993:6; Ingram 1989:50; 1994:2, 1999: 6, 2000:21; Staff reporters (*SMH*) 1995:1; Smith 1995:33; Reid1999; ABC 1999 & 2009; Hills 1991, 1999:6).

In 1995 Sue Smith (p.33) writing about alleged forgery and the Queensland auction scene claimed that

[T]he sheer volume of alleged forgeries on the Queensland market has led many to conclude that this state has become a dumping ground. It is widely thought that local and interstate art criminals – like circling vultures who apparently have become so emboldened by the state's inability to prosecute art crime in the past –now feel safe in flooding Brisbane's market with fakes.

In May 1999, Four Corners, a highly reputable investigative television program on the Australian Broadcasting Corporation, presented a program that focused on art forgery in Australia (the program has produced, on average, one show every two years on this and associated art market issues - a relatively high percentage of Four Corners shows for any topic). In an interview on the program Detective Constable Steve Murray, who was investigating works of the self-proclaimed 'innuendo' artist, William Blundell, claimed that the market was likely to contain around 3,000 paintings produced by Blundell. Many of these appeared for sale in Queensland, and generally through one source (ABC 1999). Blundell claimed authorship of 'between 3,400 and 4,000 paintings and drawings' (Hills 1998) that presented close similarities to works by a range of significant Australian artists. Blundell denied any accusations that he was faking works, but rather claimed that he was producing innuendos, and he has never been charged in relation to fake paintings.

Art fraud had begun to register as a serious issue in the public mind a year earlier, in 1998, when Melbourne dealer Lauraine Diggins accused a Queensland dealer, Leigh Murphy, of selling fraudulent paintings to her (ABC 1999). This case never proceeded to court; police were not prepared to take it forward as a criminal case and Lauraine Diggins did not pursue civil action. She did solicit the press, and in response Leigh Murphy threatened legal action for defamation.

Art fraud - scale and process

Figures cited indicate around 10% of the Australian art market is likely to be problematic, that is, lacking secure provenance and unable to be verifiably attributed to the oeuvre of a particular artist (ABC 2005). Of course not all problematic paintings are fraudulent, but they do bear a problematic relationship to provenance. Without verifiable provenance

substantial work needs to be done to determine possible sources, with the aim of being able to secure the work within the oeuvre of the artist who is purported to have produced the work, but the outcome often being that the work cannot be attributed to the artist whose name is inscribed on the work.

The entry of problematic works into the market is a facilitated activity. Some have proven to be active agents, such as art dealer John O' Loughlin, and convicted forgers Pamela and Ivan Liberto;^[1] others claim no knowledge of the problematic nature of the works involved (as was the case with Peter Gant in *Blackman and Ors v Gant and Anor* (2010)); others (such as the auction houses involved in the Liberto's case) admit to having had their guard down and demonstrating a lack of rigour in checking provenance. Some are collectors who have been caught out and quickly pass a work back into the market. Complicit behaviour means that works that should never have entered the market have found easy passage, and that once in the market, they are difficult to remove. The effectiveness of legal deterrents for art fraud is also impacted with the preference for parties to settle out of court with confidentiality agreements that avoid adverse publicity. In a market that is less than rigorous about ensuring there is a threshold of verifiability it is easier to pass fakes along in the market, or apply more local solutions, such as removing items from sale, than to follow through with an actionable complaint. An outcome of this is that many works that have had their authenticity or attribution questioned end up appearing back on the market years later. As the press accounts for the past forty years indicate, the market is aware of these works that reappear several times until they find a buyer or sink without a trace for a decade, or forever.

Laws relating to art fraud in Australia make it necessary to prove that the seller of a work not only **knowingly uttered** (sold) an artwork that was not what it was purported to be (**intentional deception**) but that they also **profited** by the deceptive sale. It is a simple to establish a chain of circumstances that makes it very difficult for a prosecutor to prove **intention** to defraud. Police have identified an additional complication in investigating and prosecuting art fraud, that is that it is often difficult to find a complainant (Baker 1999).

In a market as complicated as the art market, conservation provides the skills that can properly interrogate the physical evidence, and locate the findings of this interrogation in an appropriate context. In this respect providing advice in the form of expert witness reports to the police, the prosecution, judges, magistrates and juries is crucial. This is not recent work and the role Dr. Paul Coremans (1949) played as the head of the expert witness panel in the case against Hans van Meegeren clearly demonstrated how science has come to being considered a less subjective and ambiguous form of evidence than connoisseurship. Of course scientific findings are also open to judgement that is not always well informed, particularly when there is little historical context to draw on, as in the case of a less studied artist, or the historical context is compromised, as in the case of an artist who has been forged repeatedly and the scholarship may be compromised as a result. However, the ostensible objectivity of science is attractive to courts because it reduces reliance on the apparent subjectivity of the opinion of the connoisseur and where there are two expert witnesses providing two separate opinions the report each produces remain as clear statements that can be examined and contested. A jury can more easily read a well-presented technical report, view the work and form their own conclusions, than rely on

verbal opinion. Nevertheless, all evidence requires mediation so that it can be understood by the judge presiding over the case, by the legal representative presenting the case, and by the jury bringing judgement to bear on the case. In this respect the interdisciplinary, cross-cultural and inter-sectoral nature of conservation provides an effective basis for integrated enquiry of the kind necessary to combat art fraud.

The importance of securely established data sets

There is little point in enlisting scientific enquiry in art fraud investigation unless data sets have been developed for authentic works for the artist in question. In 1991 the University of Melbourne's CCMC, with a team that included a conservator and professors in art history, physics and chemistry, received the first grant provided by the Australia Research Council for a research project to analyse and characterise the materials and techniques of significant Australian artists. Utilising securely provenanced artworks by leading Australian artists in the University of Melbourne Art Collection, a number of databases with fields that enabled comparative data to be collected and analysed, were established. In association with this work an articulated battery of scientific techniques was established, including Polarising and Fluorescent Light Microscopy, Scanning Electron Microscopy (SEM-EDX), Raman Spectroscopy, Fourier Transform Infrared Reflectography (FTIR), X-ray Diffraction (XRD), X-ray Fluorescence (XRF), and Gas Chromatography Mass Spectrometry; more recently various Synchrotron beam line techniques have been added to these raft of techniques. The comparative fields were expanded from those of the standard condition reports that are completed during conservation treatment, and which include information about the frame, auxiliary support, support, preparatory layers, image layer and finishes. In the attribution report each field is recorded and also compared with information garnered from condition reports on securely provenanced works. Where necessary analysis is undertaken to confirm material type. Condition of the various part of the work described in all of these fields is also assessed. Using securely provenanced works that are available for close study, sets of verifiable data for comparative studies of works with insecure provenance can be established that provide information not only about artistic choices in use of material, but also how the materials used in these securely provenanced works have behaved over time. This is a complex matrix of information that is difficult to duplicate in fake works.

What began as an academic exercise to support the art history program at the University gradually expanded to include clients who sought out, or were referred to CCMC with questions about authenticity or attribution. These clients felt the scholarship that arose from understanding, and studying in depth, the materials and techniques of securely provenanced works, could help them with problems they were having in the market. Many were referred to CCMC by dealers or auction houses who were concerned about a work, but reluctant, or unable, to provide a definitive statement to the client.

The Australian Research Council has continued to provide regular funding to enable ongoing research relating to materials and techniques studies, and into issues relating to art fraud, attribution and authentication.[2] The interdisciplinary methodology, established in 1991, continues to provide the basis for attribution, in line with requirements for evidence to ensure 'subjective judgment can be supported by rational and physical analysis of the art object' (Spencer 2004: xvi). Initially databases grew from the condition reports of works

that came in for treatment, but over time these were increased to also include works that came in for authentication. Student doctoral and minor thesis study continues to add to these repositories of information. Currently CCMC has a number of comparative databases that provide information on securely provenance works, and on works identified as problematic. Points of identification between these, and within each individual set, provide good information on potential sources of any artwork in question, and it is often the case that a set of problematic works from a particular source will have more characteristics in common with each other than they do with securely provenanced works from the artist in question

Conservation technical analysis as evidence

In criminal cases the most important judgements rest with the jury, and in civil cases with the judge. In both instances those making the judgement may have a very limited, or no understanding of art practice or of the art world. For this reason the methodical and carefully documented approach of conservation translates well into the courtroom.

An attribution assessment at the CCMC proceeds in the same way as a conservation treatment. Both involve a long list checked off in more or less a particular order, working through a detailed condition report, which records materials and their condition or deterioration, conducting research about the materials and techniques of the object and options for treatment or investigation, and producing an indicative response, a proposition and a proposal based on this research. From this a Preliminary Report is produced and then, subject to further examination, a Final Report. This approach has a number of benefits. The Preliminary Report, produced prior to the commissioning of a Final Report is similar to the Treatment Proposal, in that it provides the client and the conservator with an idea of the scope of work and the issues involved. When used as part of an expert witness statement this kind of clearly articulated documentation helps the jury understand the issues and to find points of identification that would indicate why a particular painting may, or may not, be by the artist in question. This step-by-step approach also ensures that potential for error, and subjectivity, is minimised, and that, if needs be, any staff member can pick up the case, as the evidence resides in the documentation and the clarity and thoroughness of the documentation, rather than the opinion of the examiner. This process produces very clear points of identification by which the examiner can develop and test a hypothesis (for example 'That the work in question is by Arthur Streeton'.) If there are major inconsistencies between the work in question, and securely provenanced works, then the hypothesis can be reworked (for example to 'This is a heavily restored work by Arthur Streeton' or 'This work has few secure points of identification with securely provenanced works by Arthur Streeton and so cannot, on the basis of the available evidence, be attributed to Arthur Streeton). It is always possible that new evidence may lead to a reweighting of the evidence and the formulation of a different conclusion.

Between May 2002 and March 2006, Ivan and Pamela Liberto had submitted fake paintings, purported to be by renowned Australian Indigenous artist Rover Thomas[3], to some of Australia's biggest auction houses, Christie's, Sotheby's and Lawson-Menzies, where they were accepted and sold as authentic (Hagan 2007). There were several reasons why the Libertos were able to pass these works successfully into the market; these include:

- Difficulties in verifying claims about Aboriginal art due to issues of language and the tyranny of distance make it difficult to talk directly to the artist or the artist's community,
- Good scholarship is limited in the main to exhibition catalogues and there are very few catalogue raisonnés or scholarly monographs on individual artists,
- The Aboriginal art market is full of contested histories, and
- Issues of provenance remain more or less ignored; as the presiding judge in the Liberto case, Judge Roland Williams' incredulously noted, it seemed 'absurd' to rely, as the auction houses did, on the story provided by the Libertos as proof of provenance to Rover Thomas.

In the criminal trial of the Libertos in 2007, evidence included images of the application of additional washes on the white dots to simulate desert dust, and the application of red ochre chalk to the verso to produce tonal 'dirt'. SEM, FTIR and PIXE (Particle-Induced X-ray Emission) were employed to compare the pigments in containers found in the Liberto's house to those found on the problematic paintings. This analysis indicated the use of Prussian Blue and Cassel Earth in the pigment mix on the paintings, a finding supported by the pigments found during the police raid on the Liberto's apartment. Evidence also included descriptions of the method of manufacture, the way in which the paintings were constructed, and materials and tools used. In court these reports were used to help the jury visually as they grappled to understand the evidential value of the material that they were examining. The visual and physical nature of the evidence was of significant value in helping the jury understand what the problems were with the fake paintings. While the scientific analysis did not provide an absolute fingerprinting of pigments found on site, the fact that the instrumental analysis of the pigments found in the accused's apartment matched the elemental analysis of paint found on the paintings under question served to weight the balance of probability, as was accepted by the judge.

Ultimately the case rested on the visual examination of the paintings, contextualizing the work within the oeuvre of the artist, noting the material aspects and deterioration processes of the materials, and relating them back to what is known about the working practice and oeuvre of Rover Thomas as evidenced in securely provenanced works. This process of devising, and then testing the hypothesis that the works sold by the Libertos belonged to the oeuvre of Rover Thomas, built a case based on probability. This procedure is the same for all attribution studies at CCMC. Identifiable and, as much as is possible, distinct points of identification are provided through scholarship that has been undertaken on works of secure provenance. Characteristics of the works in question are then tested and shown to either be a secure match with those on securely provenanced works, or not. On the basis of these points of identification, which is to say on the basis of the evidence available, a conclusion may be drawn as to whether the works in question fit with the characteristics of securely provenance works by the artist. In the case of the Liberto works there were some points of identification in the subject matter, but less so in the materials and methods of manufacture. There were also a number of anomalies that were evident when the works in question were assessed against securely provenanced works that were painted at the time in which the fake works were purportedly painted. This meant the works that had passed into the market could not be ascribed to the oeuvre of Rover Thomas. In addition, as the judgment

determined, these anomalies indicated an intention to produce works that looked like those of Rover Thomas.

In conclusion

In criminal and civil investigations relating to art fraud, the question of how evidence is gathered in conservation laboratories is as relevant as the question of what is gathered. The technical examination of a problematic work of art and its materiality can enable a successful investigation, if conducted rigorously and methodically, and presented in a verifiable technical report that reflects art historical, object history (including evidence of provenance and condition), materials science and techniques studies. The visual analysis of style, materials and techniques can provide valuable information about the origins of the artwork. The conservator's use of technical art history as a field of enquiry centres on the primacy of the physical work of art; an inquiry into intention and creation, as well as piecing together the conceptual process and its realisation (Bomford 2008:199).

Works with a dubious history and unsubstantiated claims about authorship are going to continue to be part of the commercial art environment in Australia. For this reason effective scholarship, as demonstrated in the process of conservation, and a rigorous application of that scholarship as court evidence, makes it more difficult for forgers to hide behind conflicting expert opinion, and makes it easier for juries to understand why particular problematic paintings are, indeed, problematic.

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Endnotes

[1] In 2001, art dealer John O'Loughlin received a three-year non-custodial sentence with a good behaviour bond on five counts of making misleading statements in order to gain financial advantage under section 178BB of the NSW Crimes Act, in relation to fraudulent paintings by Australian Indigenous artist Clifford Possum Tjapaltjarri. O'Loughlin was not jailed, while those who knew Clifford Possum Tjapaltjarri claimed the case was a life sentence. In October 2007, a second criminal case involving the faking of paintings by an Aboriginal artist was presented at court in Melbourne. The perpetrators, Ivan and Pamela Liberto, were subsequently convicted of obtaining financial advantage by deception by faking the work of renowned Aboriginal artist Rover Thomas. This time the judge recommended a custodial sentence and the Libertos received a three-year good behaviour bond with a nine-month prison term.

[2] This support includes for the following:

2013-2016 ARC LEI50100050: A new national electron microprobe facility.

2008-2010 ARC LP0883309: The Twentieth Century in Paint.

2002-2004 ARC LP0211015: The Characterisation of Western Materials in Tropical Environments

2001-2003 ARC C00106875: Authentication of Australian Art - Artists' Supports

2001 ARC RIEF R00107914: Cathodoluminescence Electron Microscope Imaging and Elemental Analysis Facility

- 1999 ARC RIEF Grant Distributed national network for the scientific analysis of artworks
- 1997-1998 Small ARC Grant Artists' papers—Australian printmakers 1880–1980
- 1995 Small ARC Grant S12947515: Raman Spectroscopy: A study of its use for art and archival material research
- 1995 Small ARC Grant: John Peter Russell
- 1993–4 Small ARC Grant Arthur Streeton, the artist and his materials
- 1993 Small ARC Grant Analytical electron microscopy of Australian Art Materials 1850-1920
- 1992 Small ARC Grant SG5912317: Materials Analysis and Provenance Document for Authentication of Australian paintings (1850 – 1920)
- 1991 Large ARC Grant Forgery and Restoration: The authentication and analysis of select medieval illuminated manuscripts in Australia
- 1991 Large ARC Grant A59031202: Materials Analysis and Provenance Documentation for Authentication of Australian paintings (1850 – 1920)
- [3] Rover Thomas is one of Australia's most renowned Indigenous artists, representing Australia at the Venice Biennale in 1990, with fellow Aboriginal artist Trevor Nicholls. Amongst the Gija people of Warmun he is remembered and revered as a major cultural leader. He achieved a record price for work by an Australian Aboriginal artist in 2001, when the National Gallery of Australia purchased his work *All That Big Rain Coming from Top Side* for \$778,000.